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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GRANT L. DAVIS and
DAVIS, BETHUNE & JONES, L.L.C.,

Petitioners,

v.

JEROME S. TILZER, TODD TILZER
and JILL JOKELSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Kansas violated Article IV, Section 1, of the Constitution of the United States in refusing to give binding effect to the judgment of the Circuit Court of Jackson County, Missouri which had determined that a settlement in which the Tilzer Respondents had participated was not an aggregate settlement under Missouri law.

PARTIES TO THE PROCEEDING

Grant L. Davis, petitioner

Davis, Bethune & Jones, L.L.C., petitioner

Jerome S. Tilzer, respondent

Todd A. Tilzer, respondent

Jill Jokelson, respondent

Eli Lilly and Company, intervenor

Bristol-Myers Squibb Company, intervenor

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JURISDICTIONAL STATEMENT

The Opinion of the Supreme Court of Kansas was entered on April 3, 2009. Petitioners' Motion for Rehearing or Modification was filed on April 23, 2009. The Supreme Court of Kansas denied Petitioners' Motion for Rehearing or Modification by its Order entered June 4, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Supreme Court of Kansas by writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article IV, Section 1

Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

STATEMENT OF THE CASE

Grant L. Davis and Davis, Bethune & Jones, L.L.C. (hereinafter "petitioners") represented Rita Tilzer, now deceased, and Jerome Tilzer, Jill Jokelson and Todd Tilzer, respondents herein, in asserting their civil lawsuit in the Circuit Court of Jackson County, Missouri, Case No. 01CV224509 for damages against Eli Lilly & Company and Bristol-Myers Squibb Company, alleging their liability respecting cancer patient Rita Tilzer's receipt of cancer medicine that had been diluted by Kansas City pharmacist Robert R. Courtney. Appendix (hereinafter "App.") 4. Jerome Tilzer was the husband of Rita Tilzer. Todd Tilzer and Jill Jokelson are their children. App. 4. The Tilzers knew before engaging petitioners that petitioners already represented other individuals who asserted claims against the pharmaceutical companies arising out of the alleged dilution of cancer medicine by Courtney. App. 4. Jill Jokelson's husband, Philadelphia attorney Derek E. Jokelson, was admitted as counsel pro hac vice for the Tilzers in the Missouri lawsuit. App. 4. Rita Tilzer passed away during the pendency of the lawsuit. App. 4. The Tilzer lawsuit was one of several hundred such lawsuits filed in the Circuit Court of Jackson County, Missouri by cancer patients or their next of kin. App. 4. Many of these lawsuits were prosecuted by attorneys other than petitioners. App. 4. These lawsuits were assigned to the late Hon. Lee E. Wells. The cases were consolidated for discovery and certain other pretrial activities, but not for trial.

In 2002, BMS and Lilly advanced a settlement proposal. App. 50. Over 300 plaintiffs who had filed separate lawsuits in the Circuit Court of Jackson County were eligible, but not obligated, to participate. Unless a plaintiff affirmatively opted to participate, his or her lawsuit remained on track for adjudication. App. 50-51. The Tilzers were assured by petitioner Grant Davis that their lawsuit had not been settled, but rather that there had been a proposal presented which they had the right to accept or reject. App. 51. The Tilzers were informed that if they opted to participate, their claim would be separately evaluated by a special master appointed by the Circuit Court, and that the evaluation would establish the amount paid in the settlement of their case. App. 51. Independent of petitioners, Derek Jokelson continued to represent the Tilzers throughout the period that they considered the proposal from the pharmaceutical companies. App. 51. Derek Jokelson's father, Philadelphia attorney Neil Jokelson, also counseled the Tilzers regarding whether to participate in the settlement. App. 50-51.

Judge Wells appointed as special masters the Hon. Forest W. Hanna and the Hon. Gene R. Martin, who had formerly served as Jackson County Circuit Court Judges and, in Judge Hanna's case, on the Missouri Court of Appeals, Western District as well. App. 5. The Circuit Court of Jackson County worked with Judges Hanna and Martin to design a system for the evaluation of each participant's claim. App. 5. The settlement proposal was intentionally structured by

the Circuit Court of Jackson County, Missouri and its appointed special masters so that it would not constitute an aggregate settlement under Rule 4-1.8(g) of the Missouri Supreme Court Rules of Professional Conduct. App. 5, 54. Rule 4-1.8(g) provided:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all of the claims or pleas involved and of the participation of each person in the settlement.

The resulting methodology was approved by the Court. App. 5. The participating claimants' attorneys proceeded under the Court's authority and direction and were bound to follow the methodology that the Court approved in order for the participant to receive an award. App. 5, 55. Each plaintiff who opted to settle would thereafter furnish information about his or her individual claim to the special masters. App. 5. The special masters then separately evaluated each claim based upon the methodology they had developed with the Court that considered factors appropriate for personal injury or wrongful death claims under Missouri law. App. 5, 55. Obviously, a plaintiff who committed to settle did so without knowing what the special master's subsequent evaluation would be. App. 51. He or she also could not know in advance what the other participants' evaluations would be.

App. 51. These unknowns were inherent in the settlement methodology and were apparent to the plaintiffs and their counsel in weighing the decision whether or not to participate. If the uncertainty was unacceptable to a given plaintiff, he or she was free not to participate. App. 50-51.

The settlement option offered an alternative to litigation. A participant received a separate evaluation and award within a matter of a few months, in likely comparison to years of litigation. It must be remembered that the victims of Courtney's medicine dilution were cancer patients whose life spans were uncertain. The settlement proposal could enable these individuals to realize a recovery in their lifetimes. Furthermore, the litigation involved potentially high hurdles to favorable outcomes, such as questions of legal duty and medical causation. App. 50.

The Tilzers discussed the settlement proposal with Derek Jokelson before expressing their decision on December 26, 2002. App. 51-52. The Tilzers and Derek Jokelson were furnished with the "Terms of Settlement Agreement In Re Courtney Litigation", the "Disclosure of Global Settlement", the "Release and Settlement Agreement", and the "Confidentiality/ Non-Disclosure Agreement." App. 5. Before expressing their decision the Tilzers knew that there were over 300 separate lawsuits against the pharmaceutical companies and that nearly all of the claimants had decided to participate in the proposed settlement. App. 52. The Tilzers were also aware that the other

lawsuits were by cancer victims or their next of kin and asserted that the pharmaceutical companies should have done more to investigate, discover and disclose Courtney's conduct. App. 52. Before expressing their decision, the Tilzers were aware that the award to them, and the awards of other participating claimants, had not yet been determined. App. 52.

On December 26, 2002, the Tilzers communicated their decision to participate in the settlement proposal. Jerome Tilzer on that date executed the Disclosure of Global Settlement in which he acknowledged that petitioner Davis, Bethune & Jones, L.L.C. had informed him of the facts and circumstances of the proposed settlement offer; that Davis, Bethune & Jones was involved in representing other plaintiffs among the three-hundred-plus lawsuits on file; that he had the right to remain out of the settlement and have his case pursued separately but decided to accept the proposed settlement; and that he released Davis, Bethune & Jones from any claim of conflict of interest that might arise as part of this settlement approach. App. 52. When the Tilzer claim form was completed for submission to the special masters, Jerome Tilzer executed the Affidavit of Accuracy in which he gave the sworn agreement that the Tilzers would be bound by the court's approval or modification of the award of the settlement funds among the various claimants and waived the right to appeal the court's ruling and waived the right to a trial by jury on the merits, and that he had had these rights explained to him by his counsel. App. 52-55. The

special masters determined the amount of the awards, and the Tilzers were awarded a substantial sum, which award was approved by the Circuit Court of Jackson County. App. 5.

The Tilzers were dissatisfied with the special masters' evaluation of their claim and resisted compliance with the terms of their settlement. App. 54. The relationship between the Tilzers and petitioners deteriorated to the point that the latter filed, in the Tilzers' Missouri lawsuit, their motion for enforcement of their attorney's lien on the proceeds of the Tilzers' settlement. App. 5. The pharmaceutical companies separately filed their motion to enforce settlement agreement. App. 5. Jerome Tilzer, by now represented by current counsel, opposed the motion and asserted that the Tilzer settlement was an aggregate settlement obtained in violation of Rule 4-1.8(g) of the Missouri Supreme Court's Rules of Professional Responsibility. App. 6. The Circuit Court rejected that contention and granted the pharmaceutical companies' motion. App. 42-43, 47. The Tilzers' counsel informed the Circuit Court of Jackson County that the Tilzers opposed the attorney's lien motion upon the same grounds as expressed in their opposition to the motion to enforce settlement agreement. App. 6.

In the Missouri lawsuit, the Tilzers filed a counterclaim against petitioners alleging various theories of misconduct wrongfully causing the Tilzers to agree to participate in the settlement. App. 6. In particular, the Tilzers alleged that their settlement was part of

an "aggregate settlement" and that petitioners had not made the disclosures to them which were required under Rule 4-1.8(g) of the Missouri Supreme Court Rules of Professional Responsibility. App. 47. The counterclaim arose out of the representation of the law firms which was the subject matter of the motion for attorney's lien. In the course of seeking a continuance from the January 2, 2004 evidentiary hearing on the motion to enforce attorney's lien, the Tilzers' attorney indicated that their counterclaim met the requirements of a compulsory counterclaim under Missouri law.

On January 2, 2004, the Circuit Court of Jackson County, Missouri held the evidentiary hearing on the law firms' motion for enforcement of their attorney's lien. App. 46. At the January 2, 2004 hearing were Jerome Tilzer and Derek Jokelson, as well as their attorneys, William J. Skepnek and Frederick H. Riesmeyer II. App. 46. At the hearing Messrs. Skepnek and Riesmeyer withdrew from the courtroom following Mr. Riesmeyer's statement to the Court of their concern that their participation in the hearing would cause the issues decided by the court to have collateral estoppel effect. App. 48. At the hearing the Circuit Court of Jackson County heard evidence on the motion for enforcement of attorney's lien, including the testimony of Grant Davis and Jerome Tilzer, and received in evidence documentary exhibits regarding the settlement. App. 48.

On January 14, 2004, the Circuit Court of Jackson County entered its Order Granting Motion

for Attorney's Lien (App. 46-57), which at paragraph 16 held:

> Plaintiffs have alleged that DB&J and DKEM engaged in a variety of misconduct in the handling of their case. Plaintiffs alleged that the law firms violated Supreme Court Rule 4-1.8(g). The Court disagrees. The law firms did not settle the plaintiffs' claims on an aggregate basis or otherwise. Rather, the law firms negotiated a proposed settlement in which plaintiffs could either elect to participate or else continue to pursue their own lawsuit. Plaintiffs were under no obligation to choose this settlement method to resolve their case. They could have continued litigating their case and proceeded to trial, but they elected not to do so. If plaintiffs had elected to continue litigating their case, that decision would not have affected the other parties to the settlement. Rule 4-1.8(g) therefore does not apply.

App. 54. Also on that date, the Court entered its Judgment incorporating its order granting the motion for attorney's lien and the order of dismissal entered on the pharmaceutical companies' motion to enforce settlement agreement, and apportioned the net settlement proceeds among the Tilzers consistent with their affidavit. App. 42-45. On April 5, 2004, the Tilzers filed their Dismissal of Counterclaim. Three weeks later, they initiated the instant action in the District Court of Johnson County, Kansas.

In the Kansas lawsuit, the respective Answers filed by petitioners Grant Davis and Davis, Bethune & Jones, L.L.C. at paragraph 80, pleaded that the Tilzers' complaint should be dismissed based upon the Judgment of the Circuit Court of Jackson County, Missouri which should be given full faith and credit under Article IV, Section 1, of the United States Constitution. Petitioners thereafter filed a motion for summary judgment including the assertion that the ruling of the Circuit Court of Jackson County was entitled to full faith and credit under the United States Constitution Article IV, Section 1. Petitioners' motion argued that the Tilzers' dismissal of their Missouri compulsory counterclaim barred the reassertion of those claims in Kansas, and that the Missouri court's determination that the Tilzers had not participated in a Rule 4-1.8(g) aggregate settlement was binding and precluded relitigation of that question in the Kansas lawsuit. The Tilzers moved for summary judgment on the merits of the aggregate settlement issue. App. 35-39.

In its Journal Entry dated October 23, 2007, the District Court of Johnson County, Kansas, granted the summary judgment motion of petitioners and denied the summary judgment motion of the Tilzers. App. 35. The District Court did not mention the United States Constitution Article IV, Section 1. The Tilzers appealed to the Kansas Court of Appeals. Prior to any decision by the Court of Appeals, the Supreme Court of Kansas ordered the case transferred to it. App. 40-41. In its brief before the

Kansas Supreme Court, petitioners argued that Article IV, Section 1, applied to require the Kansas court to recognize the Missouri court's determination that the underlying settlement was not an aggregate settlement.

In its Opinion filed April 3, 2009 (App. 1-34), the Supreme Court of Kansas affirmed the District Court's determination to seal certain documents relating to the settlement, but reversed the District Court's grant of summary judgment in favor of petitioners and against the Tilzers, and remanded the case to the District Court for further proceedings. Although the Kansas Supreme Court at App. 7, 20 recognized that the Missouri court had entered a judgment on the merits of the aggregate settlement issue, the Court at App. 26-31 indicated that the underlying settlement was an aggregate settlement, notwithstanding the fact that the Circuit Court of Jackson County, Missouri, had previously held that the Tilzers had not participated in an aggregate settlement and that Rule 4-1.8(g) of the Missouri Supreme Court's Rules of Professional Conduct was inapplicable. The sole reference to the Full Faith and Credit Clause in the opinion was as follows, "The district court applied Missouri law to the collateral estoppel question. See ***Durfee v. Duke***, 375 U.S. 106, 109, 11 L.Ed.2d 186, 84 S.Ct. 242 (1963) (Full Faith and Credit Clause of the United States Constitution requires State enforcing foreign judgment to apply rendering state's law if more preclusive than that of

enforcing state). The parties do not challenge that choice of law." App. 18.

Petitioners filed their motion for rehearing or modification on April 23, 2009. In their motion at paragraph 19, petitioners complained that the Kansas Supreme Court had found that the underlying settlement was an aggregate settlement notwithstanding the fact that the Court was required to give full faith and credit to the prior Missouri court's decision that the underlying settlement was not an aggregate settlement and that Rule 4-1.8(g) of the Missouri Supreme Court's Rules of Professional Conduct was inapplicable. Petitioners' motion for rehearing or modification was denied by the Supreme Court of Kansas on June 4, 2009. App. 58.

ARGUMENT

This case arises out of the furor that erupted at the beginning of this decade upon the discovery that Kansas City pharmacist Robert R. Courtney had diluted medicine prescribed for cancer patients. Courtney admitted diluting the medicine for several dozen cancer patients, but several hundred individuals had received their cancer medicine from his pharmacy. In addition to the criminal prosecution of Courtney, which resulted in his imprisonment, several hundred civil lawsuits were brought by the patients, or their next of kin, seeking damages against Courtney, his pharmacy, and the manufacturers of

the diluted drugs, Eli Lilly and Company and Bristol-Myers Squibb Company. The pharmaceutical companies were sued on various theories presenting the basic contention that they should have done more to investigate, discover, and disclose Courtney's dilution activities. The pharmaceutical companies vigorously defended the several hundred lawsuits alleging their liability. These lawsuits against the pharmaceutical companies were settled. In one instance, the lawsuit brought by the Tilzers, respondents herein, while represented by petitioners Grant L. Davis and his firm Davis, Bethune & Jones, L.L.C., the Tilzers decided that their settlement award was insufficient and sought to renege on their agreement to settle. The Missouri court where their lawsuit was venued upheld the Tilzer settlement and granted petitioners' motion for enforcement of their attorneys' lien, and entered judgment, which the Tilzers did not appeal. Instead, the Tilzers dismissed their counterclaim against petitioners, crossed the state line, and sued petitioners again, this time in Kansas, in the hope that the courts of Kansas would disregard the Missouri judgment, and in particular, the Missouri court's determination that the settlement in which the Tilzers had participated was not an aggregate settlement within the meaning of Rule 4-1.8(g) of the Missouri Supreme Court Rules of Professional Responsibility.

The Circuit Court of Jackson County, Missouri, had "original jurisdiction over all cases and matters, civil and criminal." Mo. Const. Art. V, § 14(a) (1945). If

the Tilzers believed that the Circuit Court's judgment was erroneous, they should have appealed the judgment. Section 512.020 R.S.Mo. 2000. The Missouri Court of Appeals had general appellate jurisdiction. Mo. Const. Art. V, § 3 (1945). Judge Wells' determination that the settlement that the Tilzers participated in was not an aggregate settlement, if appealed, would have been affirmed if there was substantial evidence to support it, was not against the weight of the evidence, and did not erroneously declare or apply the law. ***Murphy v. Carron***, 536 S.W.2d 30, 32 (Mo.banc 1976). The Tilzers, however, did not attempt to appeal. The Circuit Court's judgment is final.

The Tilzers abandoned the Missouri litigation and filed suit in Kansas alleging against petitioners the same essential complaints which had been expressed in their voluntarily-dismissed Missouri counterclaim. This surely was done with the intention of securing from the Kansas courts a determination on the aggregate settlement issue that was contrary to the Missouri court's judgment. When the Kansas Supreme Court refused to be bound by the Missouri court's judgment, and substituted its own view of what Missouri law provided, the Tilzers' forum shopping was rewarded in the denial of constitutional protection to the Missouri judgment.

This Court should grant certiorari in order to rectify the Kansas Supreme Court's failure to give full faith and credit to the Circuit Court of Jackson County, Missouri's judgment finding that the Tilzers had not entered into an aggregate settlement within

the meaning of Rule 4-1.8(g) of the Missouri Supreme Court Rules of Professional Responsibility. The Kansas Supreme Court, by its opinion reversing the summary judgment entered by the District Court of Johnson County, Kansas, in favor of petitioners, found that the underlying settlement was an aggregate settlement and that the District Court had been "seduced" by the reasoning of the Missouri court.

The issue itself was especially appropriate for determination by Missouri courts. The Tilzers' attempt to avoid their settlement was largely premised on their argument that Rule 4-1.8(g) applied to impose requirements that were not observed. Rule 4-1.8(g) was a Rule of Professional Responsibility promulgated by the Missouri Supreme Court. The Missouri Supreme Court, under Mo. Const. Art. V, § 5, as well as sections 477.010 and 506.030 R.S.Mo. 2000, is authorized to establish rules for all courts of the state respecting practice, procedure and pleading. "The Rules of Professional Conduct have the force and effect of judicial decision." ***Londoff v. Vuylsteke***, 996 S.W.2d 553, 557 (Mo.App. E.D. 1999). Any question regarding the construction or application of the Missouri Supreme Court's Rules of Professional Responsibility was clearly within the competence of the Missouri judiciary.

The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, provides in pertinent part: "Full Faith and Credit shall be given in each State to the . . . judicial proceedings of every other State." As stated by this Court in ***Milwaukee***

County v. M.E. White Co., 296 U.S. 268, 276-77 (1935):

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

The Full Faith and Credit Clause was intended "to preserve rights acquired or confirmed under the . . . judicial proceedings of one state by requiring recognition of their validity in other states." ***Pac. Employers Ins. Co. v. Indus. Accident Comm'n***, 306 U.S. 493, 501 (1939).

> Regarding judgments . . . the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.

Baker v. General Motors Corp., 522 U.S. 222, 232 (1998).

Contrary to these constitutional dictates, the Kansas Supreme Court denied full faith and credit to

the judgment of the Circuit Court of Jackson County, Missouri, and in particular, the Missouri court's determination that the settlement in which the Tilzers had participated was not part of an aggregate settlement within the meaning of Rule 4-1.8(g) of the Missouri Supreme Court's Rules of Professional Responsibility.

The Missouri court's "Order Granting Motion for Attorneys' Lien" was expressly incorporated in its "Judgment" filed January 16, 2004. The Tilzers did not seek reconsideration of the Missouri court's Order Granting Motion for Attorneys' Lien. The Tilzers did not appeal the Missouri court's Judgment. As the Kansas Supreme Court subsequently acknowledged in its Opinion:

> [T]he Missouri court clearly considered the issue of whether the Global Settlement was a Rule 4-1.8(g) aggregate settlement and resolved that issue adversely to the Tilzers, i.e., the court made a 'judicial determination of which party was in the right' on that particular issue. Moreover, the Missouri court offered its reasoning for that decision. In other words . . . the Missouri court entered a judgment on the merits of the aggregate settlement issue.

If the court rendering judgment possessed jurisdiction over the cause and the parties, "[i]n such case, the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the

decision, or the validity of the legal principles on which the judgment is based." ***Milliken v. Meyer***, 311 U.S. 457, 462 (1940).

In ***Milliken***, the petitioner Milliken had obtained a judgment in the Wyoming court alleging a joint venture with Transcontinental and Meyer regarding some Colorado oil properties, and also alleging a conspiracy by Transcontinental and Meyer to defraud him. The Wyoming court entered judgment favorable to Milliken. Thereafter, Meyer filed suit in Colorado seeking damages against Milliken, as well as a decree that the Wyoming judgment was a nullity for lack of jurisdiction over Meyer or his property. Milliken's answer alleged that the Wyoming judgment was entitled to full faith and credit. The Colorado trial court found that the Wyoming court had jurisdiction and that its decree was not void, and dismissed the action. On appeal, however, the Colorado Supreme Court reversed. It did not pass on the question whether the Colorado court had jurisdiction. Instead, it held that the Wyoming court's judgment was void because of an irreconcilable contradiction between its findings and its decree.

This Court granted Milliken's petition for certiorari. It found that the Wyoming court had jurisdiction over Meyer, who was domiciled in Wyoming, and that substituted service upon Meyer in Colorado was proper. Because the Wyoming court had not lacked jurisdiction, its judgment was required to be given full faith and credit by the Colorado Supreme Court.

This Court reversed the judgment of the Colorado Supreme Court.

There is no question but that the Missouri court's judgment is final. Likewise, there has never been any claim that the Missouri court lacked jurisdiction. The Missouri court's express finding that the underlying settlement was not an aggregate settlement was and is entitled to full faith and credit in the courts of Kansas, where the Tilzers filed suit against petitioners after dismissing their Missouri counterclaim. In the District Court of Johnson County, Kansas, petitioners moved for summary judgment on several grounds, one of which was that they were entitled to summary judgment on the question of whether there was an aggregate settlement, as principles of preclusion, including full faith and credit, barred relitigation of that question. Although the Kansas District Court granted summary judgment in favor of petitioners, the Kansas Supreme Court reversed the grant of summary judgment, and in the course of its opinion stated that the underlying settlement qualified as an aggregate settlement, which was contrary to the prior judgment of the Missouri court.

The Kansas Supreme Court was bound to give full faith and credit to the Missouri judgment even if it believed that the Missouri court erroneously applied Missouri law. ***Fauntleroy v. Lum***, 210 U.S. 230 (1908). In ***Fauntleroy***, this Court held that the Mississippi court was obligated to enforce a Missouri judgment even where the Missouri judgment was based upon a misapprehension of Mississippi law.

The action of the Kansas Supreme Court is more indefensible. The Kansas Supreme Court, although recognizing that Missouri supplied the rule of decision, in effect concluded that the Missouri court had been wrong in its analysis of Missouri law, that is, Missouri Supreme Court Rule 4-1.8(g). In refusing to defer to the Missouri court, the Kansas Supreme Court did not identify any Missouri authority whatsoever that interpreted Missouri Rule 4-1.8(g) in a manner contrary to that of Judge Wells. In substituting its own analysis, the Kansas Supreme Court engrafted requirements on Missouri Rule 4-1.8(g) that were not expressed in the rule at the time of the events in question, such as that the client's "informed consent" be "in a writing signed by the client." Rule 4-1.8(g) did not contain the above-quoted language when it was construed by the Missouri court in 2003 and 2004. The Kansas Supreme Court did not challenge the jurisdiction of the Missouri Supreme Court, nor did it identify any public policy or other ground that purportedly would excuse it from giving full faith and credit to the Missouri Judgment. It is clear that the Kansas Supreme Court believed that the Missouri court was incorrect in its application of Missouri law. The Missouri court was not in error, but the applicability of the Full Faith and Credit Clause does not depend upon whether the Kansas court believed that the Missouri court correctly ruled the issue.

Although by its opinion the Kansas Supreme Court expressed its disagreement with the judgment

entered by its District Court, the fact nevertheless remains that the issue of whether there had been an aggregate settlement had been addressed and ruled on its merits by the court in Missouri which possessed the jurisdiction and the competence to do so, and the Kansas Supreme Court's ruling amounts to an unconstitutional repudiation of the Missouri court on that question. Petitioners have been aggrieved by this action and pray for the intervention of this Court.

CONCLUSION

The Constitution's guarantee of full faith and credit is hollow if, as here, the Kansas Supreme Court is free to substitute its own interpretation of Missouri law and disregard a Missouri court's Judgment. The Court should grant the petition for writ of certiorari and reverse the decision of the Supreme Court of Kansas denying petitioners' motion for summary judgment.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 99,678

JEROME S. TILZER, *et al.*,
Appellants,

v.

DAVIS, BETHUNE & JONES, L.L.C., *et al.*,
Appellees.

SYLLABUS BY THE COURT

1.

Missouri's compulsory counterclaim rule does not require a client to litigate a claim for legal malpractice in response to an attorney's motion to enforce an attorney's fee lien in the underlying action that gave rise to both the malpractice claim and the attorney's fee lien.

2.

The doctrine of collateral estoppel applies only to those issues that were necessarily and unambiguously decided in a prior adjudication.

3.

A non-class action aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent. Key features of interdependency are a condition that a specific percentage of claimants

must accept the settlement and an allocation among the claimants of a maximum aggregate settlement fund under which each claimant cannot accept or reject his or her share of the settlement without affecting the other claimants' settlement shares.

4.

In determining whether to order documents to be filed under seal, the district court should balance the parties' and the public's interest in maintaining the confidentiality of the information contained in the documents against the public policy of having court records open to public scrutiny. The district court's determination to seal documents is reviewed for an abuse of discretion.

Appeal from Johnson district court; JAMES F. VANO, judge. Opinion filed April 3, 2009. Affirmed in part, reversed in part, and remanded for further proceedings.

William J. Skepnek, of Skepnek Fagan Meyer & Davis, P.A., of Lawrence, argued the cause, and Trey T. Meyer and Mark T. Emert, of the same firm, and Steven M. Smoot, of Smoot Law Firm, P.C., of Houston, Texas, were with him on the brief for appellants.

Daniel E. Hamann, of Deacy & Deacy, LLP, of Kansas City, Missouri, argued the cause, and Dale L. Beckerman and Spencer J. Brown, of the same firm,

were with him on the brief for appellees Davis, Bethune & Jones, L.L.C. and Grant L. Davis.

Cathy J. Dean, of Polsinelli Shalton Flanigan Suelthaus PC, of Kansas City, Missouri, and Todd A. Gangel and Lori C. McGroder, of Shook, Hardy & Bacon, L.L.P., of Kansas City, Missouri, were on the brief for intervenors/appellees Bristol-Myers Squibb Company and Eli Lilly and Company.

The opinion of the court was delivered by

JOHNSON, J.: Jerome S. Tilzer, individually and as plaintiff ad litem for Rita Tilzer, Todd A. Tilzer, and Jill Jokelson, (hereafter collectively referred to as Tilzers) appeal the granting of summary judgment in favor of the defendants, Grant L. Davis and Davis, Bethune & Jones, LLC, (hereafter collectively referred to as Davis), in this legal malpractice action. Tilzers raise four issues on appeal: (1) whether Tilzers' legal malpractice claims are compulsory counterclaims to Davis' motion to enforce an attorney lien in a prior Missouri state court action and therefore barred by res judicata in the present action; (2) whether Tilzers' claims are barred by collateral estoppel based upon the litigation in the Missouri action; (3) whether the district court erred in ruling that the "Global Settlement" in the Missouri action was not an "aggregate settlement" within the meaning of Rule 4-1.8(g) of the Missouri Rules of Professional Conduct (Rule 4-1.8[g]); and (4) whether the district court erred in ordering certain documents to be sealed. We find that the district court did not

abuse its discretion in ordering that the confidential settlement documents be filed under seal. However, the court did err in holding that Tilzers' claims were compulsory counterclaims in the Missouri action and that collateral estoppel applied to the aggregate settlement issue. Therefore, we reverse and remand.

FACTUAL OVERVIEW

In September 2001, Rita Tilzer hired attorney Grant L. Davis and his firm Davis, Bethune & Jones, L.L.C., to represent her in an action against drug manufacturers Eli Lilly and Company and Bristol-Meyers Squibb Company for negligently enabling pharmacist Robert Courtney to dilute her cancer drugs. The lawsuit was one of several hundred individual suits filed in Jackson County, Missouri, by cancer patients or their surviving family members; Davis represented many, but not all of the plaintiffs. After Rita Tilzer died in January 2002, her husband and children were substituted as plaintiffs. Derek E. Jokelson, an attorney from Philadelphia and son-in-law of Rita Tilzer, acted as cocounsel for Tilzers after being admitted pro hac vice in the Missouri proceeding. Jokelson is not a named defendant in the Kansas malpractice action.

After commencement of the trial in another patient's separate case in October 2002, the pharmaceutical companies offered a settlement proposal. After mediation, a settlement agreement was reached in which all plaintiffs who had filed a lawsuit against

the companies were eligible to "opt in." Under the agreement, titled "Global Settlement," the defendants would establish a settlement fund of not less than a specified amount and not more than a specified amount, with the exact amount to be determined through binding arbitration.

The Missouri trial judge, Judge Lee Wells, appointed two special masters. One was a former circuit court judge and the other was a former Missouri Court of Appeals judge. Judge Wells worked with the special masters to develop a system for evaluating the individual claims, apparently with a view to avoiding the Global Settlement being classified as an aggregate settlement. Essentially, the special masters would apply uniform standards to each claimant who had opted in to the settlement and would determine the amount of money each claimant would receive from the settlement fund.

Tilzers opted in to the settlement agreement and completed the applicable claim form. The documents that Tilzers signed included an agreement to keep the terms of the settlement confidential. The special masters established the dollar amount to be awarded to Tilzers, and Judge Wells approved that award, despite Tilzers' objection. On November 24, 2003, the pharmaceutical companies filed a motion to enforce the settlement agreement, requesting that the court order Tilzers to execute a dismissal with prejudice and otherwise comply with the terms of the agreement. Two days later, Davis filed a motion to enforce an attorney's lien in the Missouri case.

Tilzers opposed the motion to enforce settlement, arguing that the agreement was "(1) illegal and unethical on its face; (2) [was] in violation of Rule 4-1.8(g); and (3) [had] been obtained through deceit and fraud *in factum*." At a December 22, 2003, hearing, Tilzers acknowledged that a formal response to the attorney's lien motion had not yet been filed, but advised Judge Wells that Tilzers' arguments in opposition to Davis' attorney's lien motion would track Tilzers' response to the drug companies' settlement enforcement motion. With the parties' consent, the judge continued the hearing on Davis' attorney's lien motion to January 2, 2004.

On December 30, 2003, Tilzers filed a counterclaim against Davis, alleging breach of fiduciary duty, professional negligence, and breach of contract. Tilzers asserted the same claims in a separate action filed in the United States District Court for the District of Kansas prior to January 2, 2004. That separate federal court action was subsequently dismissed for lack of complete diversity.

At the scheduled motion hearing on January 2, 2004, Tilzers sought a continuance to allow for discovery on its counterclaim. Tilzers expressed concern that the legal malpractice claim might later be deemed a compulsory counterclaim to the motion for enforcement of the attorney's lien, and, if so, Tilzers asserted that they were entitled to fully litigate the matter, including the right to conduct discovery and to submit the question to a jury. Judge Wells expressed a desire to conclude the Missouri case and

denied the continuance. However, the judge informed the parties that he did not intend for his ruling on the attorney's lien motion to foreclose any future legal malpractice action. The Tilzers withdrew from the hearing to avoid a later claim that they were collaterally estopped on their legal malpractice claims. The court heard the testimony of Grant Davis and Jerome Tilzer.

In its January 14, 2004, order, the court granted Davis' motion on the attorney's lien and memorialized its order granting enforcement of the settlement agreement. Judge Wells specifically found that the Global Settlement was not an aggregate settlement within the meaning of Rule 4-1.8(g), because of the methodology developed by the court and special masters. The court also found no credible evidence of any misconduct by Davis.

The Tilzers did not appeal the Missouri trial court's rulings. On April 5, 2004, Tilzers dismissed their counterclaim. Approximately 3 weeks later, Tilzers filed the instant legal malpractice action in the District Court of Johnson County, Kansas, claiming breach of fiduciary duty, professional negligence, negligent misrepresentation, breach of contract, and fraud arising from Davis' representation in the Missouri action. Tilzers specifically alleged that the Missouri settlement agreement was effectively an aggregate settlement and that Davis had failed to comply with the disclosure requirements of Rule 4-1.8(g).

During discovery in the Kansas malpractice action, Tilzers filed a motion to compel the testimony of Grant Davis, to which they attached documents containing information which they had agreed to keep confidential in the Missouri proceeding. The pharmaceutical companies intervened to request that the Kansas court order that any documents, pleadings, or other materials containing the terms of the Missouri settlement agreement be filed and maintained under seal. Over Tilzers' objection, the Kansas court granted the intervenors' motion.

Davis filed a summary judgment motion, claiming that the malpractice claims were compulsory counterclaims to the motion to enforce his attorney's lien in the Missouri action and, accordingly, were now res judicata in the Kansas action. Further, Davis argued that the aggregate settlement question, as well as the other claims of legal malpractice, were litigated as defenses to the motion to enforce the attorney's lien in the Missouri proceeding, and, therefore, the doctrine of collateral estoppel also precluded relitigating the issues in the current proceeding. The Tilzers responded with their motion for partial summary judgment, asking the court to find that Davis participated in the making of an aggregate settlement without providing Tilzers with the disclosures required by Rule 4-1.8(g).

The Johnson County District Court granted summary judgment to Davis, finding that all of Tilzers' claims arose from the attorney-client relationship in the Missouri action for which Davis had

sought to enforce an attorney's fee lien. The Kansas court interpreted the Missouri compulsory counterclaim rule as requiring Tilzers' malpractice claims to have been asserted in the Missouri action, and, accordingly, found Davis "entitled to summary judgment on the codified *res judicata* claim preclusion grounds." Further, the Kansas court determined that Tilzers were collaterally estopped from relitigating the aggregate settlement question.

The Kansas court denied Tilzers' motion for partial summary judgment, reasoning that because "the amount that each of [Davis'] clients would receive [under the settlement] was not and could not have been known by the lawyers prior to the announcement to all of the opted in claimants . . . this could not be an aggregate settlement contemplated by the rules of professional conduct."

Tilzers filed a timely appeal of the summary judgment rulings, and the case was transferred to this court, pursuant to K.S.A. 20-3018(c).

STANDARDS OF REVIEW

Procedurally, this case involves the review of the district court's rulings on summary judgment motions, the standard for which has been stated as:

> "'"'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact

> and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.' [Citations omitted.]"' " *Smith v. Kansas Gas Service Co.*, 285 Kan. 33, 39, 169 P.3d 1052 (2007).

To the extent we are called upon to interpret statutory provisions, we will exercise unlimited review. *Genesis Health Club, Inc. v. City of Wichita,* 285 Kan. 1021, 1031, 181 P.3d 549 (2008). However, we accord deference to the district court's determination of which, if any, documents or pleadings are to be filed under seal, and we will review that determination for an abuse of discretion. *Cf. In re Tax Appeal of City of Wichita,* 277 Kan. 487, 513, 86 P.3d 513 (2004) (district court has discretion over discovery matters and any decision made by the court in that regard will not be disturbed on appeal absent a clear abuse of that discretion).

COMPULSORY COUNTERCLAIM

The district court agreed with Davis' argument that Tilzers' malpractice claims in the Kansas action were barred by res judicata based upon Missouri's compulsory counterclaim rule. That rule provides in relevant part:

> "(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." 1 Mo. Court Rules § 55.32 (2008).

Citing to *Jewish Hosp. of St. Louis v. Gaertner*, 655 S.W.2d 638, 641 (Mo. App. 1983), the Kansas court found:

> "Under the plain meaning of Rule 55.32(a) and the interpretation given to that language by Missouri courts, a claim for damages based upon negligent performance of services arises from the same transaction as does a claim for non-payment for those same services. Thus, in an action by an attorney to recover fees from a client, a malpractice claim by that same client would be a compulsory counterclaim."

Tilzers' arguments had focused on whether Davis was an "opposing party" within the meaning of the

rule, rather than challenging whether the malpractice claims arose from the same transaction that gave rise to the attorney's fee lien. The district court acknowledged Tilzers' argument that *Gaertner* is distinguishable because it was an independent collection action, where the malpractice claimant was the named defendant and the party seeking unpaid fees was the plaintiff, *i.e.*, they were unquestionably "opposing parties." Here, in contrast, Davis was not a party to the underlying action. Tilzers contended that the distinction was critical because a counterclaiming defendant in an independent collection action possesses procedural benefits which were unavailable to Tilzers in the motion proceeding, such as the right to conduct discovery and the right to a jury trial.

The district court rejected the argument, finding that in applying the counterclaim rule in Missouri, an attorney seeking to enforce an attorney's fee lien in the underlying lawsuit is just as much an opposing party to the client (or former client) as if the attorney had brought a separate lawsuit against the former client to collect the fees. For support under Missouri precedent, the district court cited to *Hemme v. Bharti*, 183 S.W.3d 593, 596 (Mo. 2006), for the proposition that

> "The counterclaim rule is not limited to claims by a defendant against a plaintiff – Rule 55.32(a) does not use those labels. So it is possible for co-parties in some circumstances to be 'opposing parties,' for example,

> when one co-party brings a claim for its own damages against another co-party. In that circumstance, they would be opposing parties – though both originally are co-defendants – and, thus, would be subject to the compulsory counterclaim rule."

Hemme involved a personal injury action in which the plaintiff and defendant had been codefendants in a previous action. In the prior case, the personal injury defendant (then codefendant) had cross-claimed for indemnity and contribution, but the personal injury plaintiff (then codefendant) had not cross-claimed for the personal injury being claimed in the current personal injury lawsuit. The trial court found that the personal injury claim was compulsory in the prior action and therefore barred by res judicata in the current action. The Missouri Supreme Court reversed, holding that "[t]he compulsory counterclaim rule does not require a defendant against whom a cross-claim for indemnity, contribution or apportionment of fault is asserted to set forth her claim for injuries against her cross-claiming codefendant in a response." 183 S.W.3d at 595. In the dictum quoted by the Kansas court, *Hemme* was explaining that the compulsory counterclaim statute was not textually limited to plaintiffs and defendants, so that a possibility remained that co-parties could be "opposing parties" under some circumstances. However, the opinion did not stretch so far as to suggest that a nonparty to an action could trigger the compulsory counterclaim statute by filing a motion to

enforce a lien against the judgment rendered in that action.

Although the Kansas court recited that Missouri law would govern the claim preclusion issue, it relied heavily on an opinion from the New Mexico Court of Appeals, *Computer One, Inc. v. Grisham & Lawless, P.A.*, 141 N.M. 869, 873, 161 P.3d 914 (Ct. App. 2007), *rev'd* 144 N.M. 424, 188 P.3d 1175 (2008), which involved similar facts and a similar compulsory counterclaim statute. There, the law firm representing Computer One in a contract action entered into a settlement agreement. Computer One refused to comply with the settlement, claiming the law firm did not have authority to enter into the agreement. The law firm withdrew and subsequently filed notice of a charging lien against the settlement proceeds. The other party to the contract dispute sought court enforcement of the settlement agreement. The trial court found that the law firm was authorized to enter into the agreement and ordered its enforcement.

Computer One objected to the attorney's fee charging lien, arguing that the fees were unreasonable and excessive and renewing the claim that the firm never had authority to enter into the settlement agreement. The court dismissed Computer One's objections as untimely filed and ordered disbursement of the settlement funds including payment of the attorney's fee lien.

Over a year later, Computer One brought a legal malpractice claim against the firm, asserting negligence in handling their claims and settlement negotiations. The firm moved for summary judgment, arguing that the malpractice action was precluded because it was a compulsory counterclaim to the charging lien. The firm also argued that the malpractice allegations were substantively the same as the defenses asserted against the charging lien, and therefore those allegations could not be relitigated. The New Mexico Court of Appeals affirmed the trial court's granting of summary judgment for the law firm, reasoning that Computer One met the definition of an "opposing party" to the firm's charging lien, even though the charging lien was filed in the underlying lawsuit. 144 N.M. at 428.

Subsequent to the district court's memorandum decision in this case, the New Mexico Supreme Court reversed the Court of Appeals, finding that an "opposing party" under that state's compulsory counterclaim law, Rule 1-013(A), "'must be one who asserts a claim against the prospective counterclaimant in the first instance.'" 144 N.M. at 430. Since the lien was asserted in the underlying litigation and not in a separate collection action naming Computer One as the defendant, the adversarial requirement had not been met. The Supreme Court further explained:

> "The notion of fair notice implicit in Rule 1-013(A) follows one's status as an opposing party. Nothing in that rule speaks about

> 'degrees of hostility' or a 'sufficiently adversarial' relationship, or other terms susceptible to a variety of interpretations, as a substitute for being an 'opposing party.' Nothing in Rule 1-013(A) would force a compulsory counterclaim on one who is not first a 'party.' Given the grave consequences of Rule 1-013(A), we think that rule is better served by a sense of certainty and predictability implicit in the notion that one must first be a 'party' before one can be an 'opposing party.' . . . [A]n attorney does not transform his former client into either, merely by taking steps to secure attorney fees in the same underlying proceeding.
>
> "On the other hand, if the Firm had wanted to file a separate suit for breach of contract against Computer One for its attorney fees, then . . . Computer One would have had to press its legal malpractice allegations simultaneously as a compulsory counterclaim. [Citation omitted.] The Firm chose not to do so." *Computer One,* 144 N.M. at 431.

While the New Mexico precedent is not binding authority, its reasoning is persuasive, especially in light of Missouri case law establishing the methods by which attorneys may recover fees from their clients: (1) By proceeding against the client; (2) by proceeding against the defendant, either by motion in the original case or in an independent proceeding; or (3) by proceeding against the judgment itself. *Nelson v. Massman Const. Co.,* 120 S.W.2d 77, 89 (Mo. App.

1938). By moving to enforce an attorney's fee lien in the underlying action, Davis was proceeding against the judgment itself, not against the former client. Such an action does not transform the former client into an "opposing party" for purposes of the compulsory counterclaim rule. To invoke that rule, Davis had to file an independent action against Tilzers, *i.e.*, had to become a "party" in the first instance.

In conclusion, the district court erred in finding that Missouri's compulsory counterclaim rule required Tilzers to assert their legal malpractice claims as a response to Davis' motion to enforce an attorney's fee lien in the underlying Missouri lawsuit. Summary judgment on the issue of claim preclusion is reversed.

COLLATERAL ESTOPPEL

Alternatively, the Kansas court found that Tilzers were precluded from relitigating the aggregated settlement issue in the present case under the doctrine of collateral estoppel. That doctrine operates to preclude the reconsideration of issues that were actually litigated in the prior proceeding, in contrast to claim preclusion which bars the assertion of claims which should have been brought in the prior proceeding. *See Hollida v. Hollida,* 190 S.W.3d 550, 555 (Mo. App. 2006). Thus, although we have found that Tilzers' malpractice claim was not barred in the present case, we must also determine if Tilzers can assert their aggregate settlement issue as a basis for that claim in Kansas. *Cf. Computer One,* 188 P.3d at

1184-85 (issues litigated in defending against attorney's fee lien precluded in subsequent malpractice action).

The district court applied Missouri law to the collateral estoppel question. *See Durfee v. Duke,* 375 U.S. 106, 109, 11 L. Ed. 2d 186, 84 S. Ct. 242 (1963) (Full Faith and Credit Clause of United States Constitution requires State enforcing foreign judgment to apply rendering state's law if more preclusive than that of enforcing state). The parties do not challenge that choice of law. The Missouri test has been stated as:

> "In deciding whether collateral estoppel applies, the following four factors are considered: (1) is the issue in the present case identical to the issue decided in the prior adjudication; (2) was there a judgment on the merits in the prior adjudication; (3) is the party against whom collateral estoppel asserted the same party or in privity with a party in the prior adjudication; and (4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue in the prior suit[?] The doctrine applies only to those issues that were necessarily and unambiguously decided. [Citation omitted.]" *State ex rel. Johns v. Kays,* 181 S.W.3d 565, 566 (Mo. 2006).

Tilzers concede that the first factor (identical issue) and the third factor (identical parties) were both met in this case. They challenge the applicability of collateral estoppel based upon the second and

fourth factors, asserting that the Missouri court did not enter a judgment on the merits and that Tilzers did not have a full and fair opportunity to litigate the issue in that proceeding.

The second collateral estoppel factor was considered in *Wilkes v. St. Paul Fire and Marine Ins. Co.*, 92 S.W.3d 116, 121 (Mo. App. 2002), which stated:

> "A judgment on the merits is one rendered when it is determined which party is in the right after argument and investigation, as distinguished from a judgment rendered upon some preliminary or technical point, or by default, and without trial. [Citation omitted.] Where there is a question of whether a previous decision went to the merits of the case, no preclusive effect is given to the earlier decision."

Wilkes found that the requirement of a judgment on the merits of an issue was satisfied in a summary judgment where the court's memorandum of decision reflected that it had considered and resolved the issue. 92 S.W.3d at 121.

Tilzers argue that *Wilkes* is distinguishable because the parties in that case had filed a petition and an answer and had engaged in discovery. In contrast, the Tilzers point out that they filed a counterclaim which was dismissed without a responsive pleading. They claim that "[t]here was no argument or investigation, no judicial determination of which party was in the right." We disagree.

In challenging the enforcement of the settlement agreement, Tilzers explicitly argued that the Global Settlement was invalid because it was an aggregate settlement within the meaning of Rule 4-1.8(g). The Missouri court rejected that argument, finding that the settlement was not an aggregate settlement within the purview of Rule 4-1.8(g). With respect to the attorney's fee lien motion, Tilzers' counsel clearly advised Judge Wells that part of the defense to the motion was that Davis violated the disclosure requirements of Rule 4-1.8(g). Given that those disclosure requirements are only triggered by an aggregate settlement, Tilzers were simply advancing the same issue, *i.e.,* whether the Global Settlement was an aggregate settlement. In short, the issue was clearly argued to the Missouri court.

Granted, Judge Wells did explicitly state that it was not the court's intent to foreclose a subsequent malpractice action by ruling on the motion to enforce the attorney's fee lien. However, the Missouri court clearly considered the issue of whether the Global Settlement was a Rule 4-1.8(g) aggregate settlement and resolved that issue adversely to the Tilzers, *i.e.,* the court made a "judicial determination of which party was in the right" on that particular issue. Moreover, the Missouri court offered its reasoning for that decision. In other words, consistent with *Wilkes,* the Missouri court entered a judgment on the merits of the aggregate settlement issue.

To the extent Tilzers complain about the posture of the pleadings in the case at the time of judgment or

the lack of an opportunity to fully investigate the issue prior to judgment, they are challenging whether the issue was ripe for a judgment on the merits. However, that query does not affect the second factor of whether the Missouri court did, in fact, enter a judgment on the merits.

In analyzing the fourth factor or element of collateral estoppel, *i.e.*, whether Tilzers had a full and fair opportunity to litigate the issue in the Missouri lawsuit, the Kansas court noted that Missouri courts look at an additional four factors to resolve this step, to wit:

> "(1) did the party against whom collateral estoppel is asserted have a strong incentive to litigate the prior adjudication; (2) does the second forum afford the party against whom collateral estoppel is asserted procedural opportunities not available in the first action; (3) is the prior judgment, upon which collateral estoppel is based, inconsistent with one or more prior judgments; and (4) was the forum in the first action substantially inconvenient to the party against whom collateral estoppel is asserted[?]" *Wilkes,* 92 S.W.3d at 122.

The third and fourth factors are not in play in this case. There was no prior inconsistent judgment, and the Missouri proceeding was not inconvenient for the parties.

On the first factor, the Kansas court rejected Tilzers' argument that they did not have a strong

incentive to litigate the issue in the Missouri lawsuit because that action was not the "'proper forum to fulfill their rights.'" The court opined that Tilzers "strongly wished to litigate the issue of the aggregate settlement," but that they "just wished to litigate the issue in this court, not in Missouri." That rationale appears to overlook that the aggregate settlement issue was simply a component of Tilzers' overarching claim that Davis had committed malpractice in representing them in the Missouri action. Tilzers "strongly wished" to fully litigate their entire claim of malpractice in a manner consistent with the procedural and substantive rights which would have been available to them in a separate malpractice lawsuit. Once Judge Wells clarified that he was going to rule on the motion to enforce the attorney's fee lien without a full litigation of all of the malpractice allegations and without prejudice to further litigation on the question of malpractice, the Tilzers had scant incentive to partially litigate their claim on the aggregate settlement subissue.

The Kansas court acknowledged that Tilzers had "a stronger argument on the second factor" – that the Kansas proceeding offered procedural opportunities not available in the Missouri action. Nevertheless, the district court determined that Tilzers did have some discovery opportunities in Missouri and that they had failed to identify any witness or document that was not available to them in Missouri. That rationale is unpersuasive.

The short time line in the motion proceedings made meaningful discovery impracticable. Moreover, it is counterintuitive to declare that the unavailability of discovery is not prejudicial unless the complaining party can identify the witnesses and documents that would have been discovered. One of the purposes of the discovery process is to enable a party to learn of those witnesses and documents which will be useful in the litigation. On the other hand, Tilzers do not explain how having a jury as the factfinder or having discovery to obtain additional facts would have affected Judge Wells' ruling on the *legal* effect of the Global Settlement. Nevertheless, there can be no question that the independent lawsuit in Kansas offered Tilzers procedural opportunities that were unavailable to them in the Missouri proceedings on Davis' motion.

Additionally, the collateral estoppel doctrine in Missouri only applies "to those issues that were necessarily and unambiguously decided" in the prior adjudication. *See Kays,* 181 S.W.3d at 566. While Judge Wells unambiguously ruled that the Global Settlement was not invalid as an aggregate settlement, his ruling on the issue in the context of the attorney fees motion is less straightforward. More importantly, however, a ruling on the aggregate settlement issue does not appear to have been necessary for Judge Wells' decision on Davis' attorney's fee lien motion.

The Missouri court announced that its order enforcing the attorney's fee lien would not affect

Tilzers' malpractice claims against Davis. Apparently, the court viewed the task presented by the attorney's fee lien motion to be a calculation of the amount of fees that Tilzers contracted to pay Davis and a determination of the reasonableness of those fees. In that event, the aggregate settlement issue was only relevant, if at all, to the question of whether Tilzers were entitled to an offset against Davis' attorney's fee lien based on malpractice. If the Missouri court was declining to rule on the malpractice claim, it had no reason to reach the subissue within that claim regarding any violations of the disclosure requirements of Rule 4-1.8(g). In other words, the ruling on the aggregate settlement issue was gratuitous and unnecessary to the decision rendered on the attorney's fee lien.

Perhaps more fundamentally, Rule 4-1.8(g) is a rule of professional conduct defining an unethical conflict of interest for an attorney representing two or more clients in a particular action. It is not a statutory provision governing the validity of settlement agreements, *i.e.*, rendering aggregate settlements unlawful as a matter of law. Indeed, if all of the plaintiffs in the Missouri lawsuit had been represented by separate counsel, Rule 4-1.8(g) would not have applied, regardless of the terms of the settlement.

Likewise, compliance with the ethical rule is not necessarily a condition precedent to the enforcement of an attorney's fee lien. The preamble to the Kansas Rules of Professional Conduct (KRPC) Rule 226 (2008

Kan. Ct. R. Annot. 391) explains the scope and function of the rules, clarifying that an ethical violation does not establish a per se claim for malpractice:

> "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are involved by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule." KRPC (Preamble-Scope) 2008 Kan. Ct. R. Annot. at 395.

Likewise, this court has opined:

> "An attorney's violation of the ethics rules cannot create a cause of action to adverse litigants or even to clients. This is because the ethics rules do not impose a legal duty on the attorney owing to either a client or a third party. Occasionally, attorney conduct

> which violates an ethics rule may also violate an independent legal duty and a cause of action may ensue. It is the violation of the independent legal duty, not the ethics rule, that gives rise to a cause of action." *OMI Holdings, Inc. v. Howell,* 260 Kan. 305, Syl. ¶ 1, 918 P.2d 1274 (1996).

Thus, even in the Kansas malpractice action, a finding that Davis violated Rule 4-1.8(g) is unnecessary. Obviously, the Missouri action was not an attorney disciplinary proceeding, and an interpretation of the applicability of the ethical rules was not required. Accordingly, the Kansas district court erred in applying the doctrine of collateral estoppel.

AGGREGATE SETTLEMENT

The Kansas district court's decision included a denial of Tilzers' motion for partial summary judgment on the question of whether Davis participated in making a Rule 4-1.8(g) aggregate settlement without making the requisite disclosures. The district court found that the Global Settlement was not an aggregate settlement because the information required to be disclosed under the rule was not and could not have been known. We disagree with the analysis. The lack of information would actually support a finding that it was an aggregate settlement.

To review, Missouri Rule 4-1.8(g) provides that an attorney representing two or more clients is not to

participate in an aggregate settlement of the clients' claims, unless each client has given a written, signed, and informed consent to the settlement. To obtain the consent, the attorney's disclosure to the clients is to include the existence and nature of all of the claims and of the participation of each person in the settlement.

The parties acknowledge that neither Kansas nor Missouri has any law specifically defining an aggregate settlement. We have located no assistance from the law of any of our sister states. We note that Tilzers cite to *Straubinger v. Schmitt,* 348 N.J. Super. 494, 792 A.2d 481 (2002), and Davis cites to *Arce v. Burrow,* 958 S.W.2d 239, 245 (Tex. App. 1997), *aff'd in part and rev'd in part,* 997 S.W.2d 229 (Tex. 1999), but find neither case to be sufficiently on point to assist with interpreting whether the terms of the Global Settlement constituted an aggregate settlement.

Although not cited by either party, we note that the American Law Institute (ALI) has recently completed a 5-year project on the development of the Principles of the Law of Aggregate Litigation, issuing its Tentative Draft No. 1 on April 7, 2008. The ALI distinguishes between class action and non-class action aggregate settlements, defining the latter as follows:

> "Definition of a Non-Class Aggregate Settlement
>
> "(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.
>
> "(b) The resolution of claims in a non-class aggregate settlement is interdependent if:
>
> (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants; or
>
> (2) the value of each claim is not based solely on individual case-by-case facts and negotiations." Principles of the Law of Aggregate Litigation § 3.16, p. 322.

Under this definition, interdependency is the key. The commentary notes that the definition incorporates the two settlement characteristics that render claims interdependent: (1) collective conditionality and (2) collective allocation. The former suggests that a settlement conditioned on the acceptance of a specific percentage of claimants is an aggregate settlement. The latter establishes the existence of an aggregate settlement if the value of each claim is determined by any method other than on an individual basis. The ALI also recognizes the possibility of "multiclaimant nonaggregate settlements," which it defines as a settlement where the defendant is "willing to negotiate an individual, fact-specific

settlement for each claimant without setting a cap on the aggregate damages or insisting that a set percentage of the potential claimants agree to the settlement." Principles of the Law of Aggregate Litigation § 3.16, p. 325.

The ALI provides a helpful illustration:

> "An attorney represents 100 plaintiffs complaining of various injuries caused by an allegedly defective drug manufactured by Defendant. During settlement negotiations the attorneys for the plaintiffs and Defendant individually assess each claim with a goal that the total settlement would equal $1 million. Defendant agrees to the settlement only if at least 95 percent of all of the claimants agree. The settlement is an aggregate one under subsection (b)(1), even though the amounts were individually negotiated, because Defendant has conditioned its acceptance of the settlement on a set percentage of claimants agreeing to the settlement and because Defendant placed a cap on the collective settlement." Principles of the Law of Aggregate Litigation § 3.16, p. 325-26.

Similarly, Tilzers point us to the ABA definition, which states that "an aggregate settlement occurs 'when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas.'" ABA/BNA Lawyers' Manual on Professional Conduct, p. 51:377 (2006). The ABA Manual notes that "a settlement of a group of related claims is an aggregate settlement unless (1) a particular

amount is negotiated on behalf of each individual plaintiff, and (2) each plaintiff is free to accept or reject the offer without affecting anyone else's settlement." ABA/BNA, p. 51:378.

Under the ALI definition, the Global Settlement had both characteristics of interdependency which define an aggregate settlement. There was collective conditionality because the pharmaceutical companies were granted the right to opt out of the settlement if fewer than all of the covered plaintiffs accepted the proposed settlement. Although Judge Wells attempted to circumvent the conditional allocation characteristic by appointing special masters to individually assess each claim, the Global Settlement contained a maximum amount that the defendants would pay into the settlement fund and provided for an across-the-board minimum payment to all opt-in claimants. In other words, each claimant did not receive individualized, fact-specific damages, but rather each claimant received an individualized, fact-specific allocation of a proportion of the capped settlement fund, subject to a minimum award for every participant.

Likewise, the Global Settlement runs afoul of the ABA guidelines. A particular amount of damages was not negotiated on behalf of each individual plaintiff. Rather, a percentage of the total settlement fund was established for each individual plaintiff. Thus, the amount awarded to one plaintiff directly affected the amount of the other plaintiffs' awards. More importantly, each plaintiff was not free to accept or reject

the special masters' proffered award, as poignantly illustrated by Judge Wells' order forcing Tilzers to accept their calculated share of the pot.

Therefore, notwithstanding the concerted effort of Judge Wells and the special masters to devise a mechanism to avoid labeling the Global Settlement as an aggregate settlement, the defining characteristic of interdependency remained intact. The terms of the Global Settlement contained all of the important features of an aggregate settlement.

The Kansas district court was seduced by Judge Wells' opinion that the Global Settlement could not be an aggregate settlement because the information that Rule 4-1.8(g) required to be disclosed to obtain an informed consent was not available to Davis. However, that dearth of information was the direct result of the interdependent characteristics of the Global Settlement, *i.e.*, the information could not be ascertained because the arrangement was an aggregate settlement. Rather than establishing a non-aggregate settlement, the unavailability of the information required to be disclosed by Rule 4-1.8(g) simply corroborated that it was an aggregate settlement and rendered it impossible for Davis to obtain an informed consent under the rule. The district court's ruling to the contrary was erroneous.

SEALED DOCUMENTS

Finally, Tilzers challenge the district court's granting of the intervening drug companies' motion to

maintain the confidentiality of the settlement agreement reached in the Missouri action. Tilzers base their complaint upon the public's interest in knowing the details of the settlement agreement.

Tilzers do not dispute that they entered into and personally signed a confidentiality agreement on at least two of the documents involved in the Missouri settlement and that the Missouri court memorialized the confidentiality agreement by entering appropriate protective orders in that proceeding. Accordingly, they acknowledge that the intervenors have a contractual right to have the settlement terms remain confidential. Nevertheless, they suggest that private contract rights must always give way to the public interest, and they contend that the intervenors failed to show any public interest in maintaining the confidentiality of the settlement agreement.

First, we ascribe more significance to an entity's rights under a court-approved settlement agreement than Tilzers would suggest. In deciding whether information should be sealed, a court should consider the interests of the party seeking confidentiality, as well as the public's interest. *Cf. In re Tax Appeal of City of Wichita,* 277 Kan. 487, 514, 86 P.3d 513 (2004) (in deciding whether to permit discovery, court should balance the interest in obtaining the information against the resisting party's interest, as well as the public interest in maintaining confidentiality of the material). Obviously, the intervenors had an interest in shielding all of the terms of their current settlement offer from future plaintiffs.

In addition, the law and policy of this State is to favor out-of-court settlements of disputed claims. *See, e.g., Bright v. LSI Corp.*, 254 Kan. 853, 860, 869 P.2d 686 (1994) (recognizing a strong public policy supporting settlement); *Kennedy v. City of Sawyer*, 228 Kan. 439, 461, 618 P.2d 788 (1980) ("Settlements between injured parties and tortfeasors are favored in the law."). As the intervenors and Davis point out, it is unlikely that a settlement would have been reached in this case without the confidentiality provision. Certainly, settling over 300 individual lawsuits without trial is in the public interest.

In contrast, Tilzers do not contradict the intervenors' argument to the district court that publicizing the settlement terms would not advance Tilzers' claims of malpractice in the Kansas case and maintaining the confidentiality of the settlement terms would not impede the pursuit of the legal malpractice action. Instead, Tilzers simply declare that the impact upon them of the partial sealing of documents "has no significance." We take that as a concession that the court order sealing certain documents did not prejudice Tilzers in the prosecution of their legal malpractice action.

The overarching theme of Tilzers' impassioned argument on this issue appears to be that the public has a right to know that the pharmaceutical companies orchestrated an illegal settlement of a highly publicized and emotional case. Tilzers are in the wrong venue to make that argument. This is a legal malpractice action, where the most that will be

established is that Tilzers' own former attorneys breached a legal duty by laboring under a conflict of interest among several clients involved in a single settlement agreement. The legality of the pharmaceutical companies' actions in proposing the settlement will not be implicated in any manner. Judge Wells' ruling that the settlement agreement was legal and valid will not be overturned. In short, Tilzers should have attempted to shine the light of public scrutiny upon the Missouri proceedings, rather than attempt to circumvent the Missouri court's protective orders in this Kansas proceeding.

In conclusion, we find that the Kansas district court's order sealing those documents that contained confidential information about the Missouri settlement agreement was not an abuse of discretion. However, the district court's granting of Davis' summary judgment motion is reversed, and the matter is remanded for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings.

DAVID J. KING, District Judge, assigned.

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS

JEROME S. TILZER, *et* al., Plaintiffs,	)	Case No. 04 CV 03239
v.	)	Division 2
DAVIS, BETHUNE & JONES, LLC, *et al.*,	)	K.S.A. Chapter 60
Defendants.	)	

JOURNAL ENTRY

(Filed Oct. 23, 2007)

On June 27, 2007, the captioned matter came before the Court for arguments on motions for summary judgment filed by plaintiffs and by defendants Grant L. Davis and Davis, Bethune & Jones, LLC.

Plaintiffs filed a motion for partial summary judgment. In their motion plaintiffs urged the Court to hold that the settlement of the claims of plaintiffs against the pharmaceutical companies Eli Lilly & Company and Bristol-Myers Squibb Company arising out of pharmacist Robert R. Courtney's dilution of certain cancer medicines, was part of an "aggregate settlement" and that informed consents to the settlement were not obtained by defendants.

In plaintiffs' statement of uncontroverted facts, the Court finds the following paragraphs established, or not sufficiently controverted as contemplated by

Supreme Court Rule 141: paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 20, 21, 28, 41, 42 and 43.

In defendants' statement of uncontroverted facts, the Court finds the following paragraphs established, or not sufficiently controverted as contemplated by Supreme Court Rule 141: paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 19, 21, 22, 23, 24, 25, 26, and 27.

Defendants filed a motion for summary judgment. In their motion defendants asserted that all of plaintiffs' claims were barred by the doctrine of res judicata or claim preclusion. In their motion defendants separately sought partial summary judgment on the question of whether the underlying settlement in question was an "aggregate settlement," maintaining that the Circuit Court of Jackson County, Missouri previously determined that the underlying settlement was not an aggregate settlement and that its holding was binding and conclusive on that issue in this case.

In their motion defendants claim entitlement to summary judgment in their favor on all of plaintiffs' claims on the basis of res judicata. Plaintiffs' claims made here were first asserted as counterclaims to defendants' motion for enforcement of attorney's lien filed in the Circuit Court of Jackson County, Missouri but were voluntarily dismissed by plaintiffs. The Court holds that plaintiffs' claims were compulsory counterclaims in that proceeding. As such, the compulsory counterclaim rule bars their reassertion

in this action after plaintiffs voluntarily dismissed their counterclaims in Missouri rather than pursue them to adjudication. There is no genuine issue of material fact and defendants are entitled to judgment in their favor as a matter of law. Accordingly, the Court grants defendants' motion for summary judgment on all of plaintiffs' claims.

Defendants separately sought partial summary judgment that the Tilzer settlement was not part of an "aggregate settlement". In the Circuit Court of Jackson County, Missouri, the question whether the underlying settlement was an "aggregate settlement" was raised by plaintiffs in opposition to defendants' motion to enforce their attorney's lien. Subsequent to the Missouri hearing concerning defendants' motion to enforce their attorneys' lien, Judge Lee E. Wells issued an order granting the same. In his order, Judge Wells makes a specific finding that the settlement entered into by the Tilzers in the *Courtney* case was not an "aggregate settlement" prohibited by rules of professional conduct or precluding recovery of the earned fees. Judge Wells was addressing an issue raised specifically by the plaintiff. The Court has carefully considered the factors which govern the applicability of the doctrine of collateral estoppel, and holds that the relevant factors support defendants' motion contending that the prior holding of the Circuit Court of Jackson County, Missouri, that the subject settlement was not an aggregate settlement, is binding and conclusive on that issue here. Accordingly, the Court grants defendants' motion for

partial summary judgment on the "aggregate settlement" issue.

The Court independently reviewed the merits of the "aggregate settlement" issue raised by plaintiffs' motion for partial summary judgment. Plaintiffs asserted that defendants consummated an aggregate settlement in violation of Missouri Supreme Court Rule 4-1.8(g) and K.R.P.C. 1.8(g). Defendants presented facts and authorities supporting their contention that the underlying settlement with the pharmaceutical companies was not an aggregate settlement. This Court, having considered the parties' briefing and arguments, finds that the underlying settlement was not structured in such a way as to constitute an aggregate settlement; that the *Courtney* claimants' claims were not resolved through an aggregate settlement; that the settlement was not be an aggregate settlement; and it could not alone be a violation of the lawyers' professional conduct. The Court accordingly denies plaintiffs' motion for partial summary judgment.

The Court hereby enters judgment in favor of defendants Grant L. Davis and Davis, Bethune & Jones, LLC and against plaintiffs on plaintiffs' petition and all claims stated therein. The Court separately holds that defendants are entitled to partial summary judgment on the question whether the settlement was an "aggregate settlement". The Court further finds in favor of defendants and against plaintiffs on plaintiffs' motion for summary judgment and holds that even if preclusion principles did not

apply, the uncontroverted material facts show that the underlying settlement was not an aggregate settlement. Costs are taxed against plaintiffs for which let execution issue.

Dated: 18 Oct 07 /s/ James F. Vano
James F. Vano
District Judge, Division 2

APPROVED AS TO FORM:

/s/ _____
William J. Skepnek
Attorney for Plaintiffs

/s/ Dale L. Beckerman
Dale L. Beckerman
Attorney for Defendants
Grant L. Davis and
Davis, Bethune & Jones, LLC

/s/ Lori McGroder
Lori C. McGroder, Esq.
Attorneys for Intervenor
Eli Lilly Company

/s/ _____
Cathy Dean, Esq.
Attorneys for Intervenor
Bristol-Myers Squibb Company

[Certificate Of Service Omitted In Printing]

IN THE SUPREME COURT OF
THE STATE OF KANSAS

KATHERINE ADAMS, *Appellant*, v. BOARD OF SEDGWICK COUNTY COMMISSIONERS *et al.*, *Appellees*.	))))	No. 99,195
MICHAEL L. LEVIN, *et al.*, *Appellees*, v. MA W. OIL & GAS, LLC, *et al.*, *Appellants*.	)))	No. 100,132
WOLFE ELECTRIC, INC., *Appellee*, v. TERRY J. DUCKWORTH, *et al.*, *Appellants*.	))))	No. 99,536
JEROME S. TILZER, *et al.*, *Appellants*, v. DAVIS, BETHUNE & JONES, L.L.C., *et al.*, *Appellees*.	))))	No. 99,678
ED STRODA, *Appellee*, v. JOICE HOLDINGS, L.L.C., *Appellees*.	)))	No. 100,733
CITY OF NEODESHA, KANSAS, *et al.*, *Appellee*, v. BP CORPORATION NORTH AMERICA, *et al.*, *Appellants*.	)))))	No. 101,183

ORDER

UPON EXAMINATION of the documents filed in the captioned appeals, the Court, pursuant to K.S.A. 20-3018(c), does hereby transfer the cases to the Supreme Court for review and determination.

BY ORDER OF THE COURT this 5th of November, 2008.

FOR THE COURT

/s/ Kay McFarland
KAY McFARLAND
Chief Justice

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

JEROME S. TILZER, individually and as the Plaintiff Ad Litem for RITA TILZER, Plaintiff,	)	Master No. 01-CV-21887-01
v.	)	Docket: RCP
COURTNEY PHARMACY, INC., et al., Defendants.	)	Case No. 01-CV-224509

JUDGMENT

(Filed Jan. 16, 2004)

Plaintiffs Jerome Tilzer, Todd Tilzer and Jill Jokelson agreed to submit their claims against defendants Eli Lilly and Company and Bristol-Myers Squibb, arising out of the final illness and death of Rita Tilzer, to evaluation and award by a special master, under the supervision of the Court, pursuant to the terms of a settlement in which plaintiffs elected to participate. The special master's subsequent award to plaintiffs of $308,663.50 was approved by the Court. Plaintiff Jerome Tilzer filed his objection to the award which objection the Court overruled.

The Court, by separate Order which is incorporated herein, has granted the Motion to

Enforce Settlement Agreement filed by defendants Eli Lilly and Company and Bristol-Myers Squibb over the opposition of plaintiffs as expressed by their counsel at hearings on November 26, 2003 and December 22, 2003 and as set forth in the Response of Jerome S. Tilzer to Motion to Enforce Settlement Agreement of Eli Lilly and Company As Joined In by Bristol-Myers Squibb Company.

Also by separate Order which is incorporated herein, the Court has granted the Law Offices of Davis, Bethune & Jones, LLC and Davis, Ketchmark, Eischens & McCreight's Motion to Enforce Attorneys' Lien Pursuant to Mo. Rev. Stat. Section 484.130, and has ordered the payment of attorneys' fees to movant law firms jointly in the sum of $92,590.05.

The Court has considered the affidavits of plaintiffs Jerome Tilzer, the surviving spouse of Rita Tilzer; Todd Tilzer, the surviving son of Rita Tilzer; and Jill Jokelson, the surviving daughter of Rita Tilzer, in which they indicate their agreement to the apportionment of the net settlement proceeds among them. The Court finds that said plaintiffs are the person entitled to share in the proceeds and that each has suffered loss. The Court finds that the apportionment of proceeds. suggested by plaintiffs themselves is appropriate.

The Court accordingly hereby ORDERS AND ADJUDGES:

(1) The total settlement in the sum of $308,633.50 is hereby approved.

(2) Plaintiffs shall deduct from that settlement attorneys' fees of $92,590.05 payable jointly to Davis, Bethune & Jones, LLC and Davis, Ketchmark, Eischens & McCreight. (40% less 10% for attorney Derek Jokelson, husband of plaintiff Jill Jokelson).

(3) The net settlement proceeds are apportioned, and shall be distributed, as follows:

(I) plaintiff Jerome Tilzer shall receive 50%, or $108,021.73;

(ii) plaintiff Todd Tilzer shall receive 25%, or $54,010.86; and

(iii) plaintiff Jill Jokelson shall receive 25%, or $54,010.86.

(4) Interest accrued on the settlement proceeds shall be distributed to plaintiffs in the proportions indicated above.

(5) Plaintiffs shall collect and receipt for payment of this Judgment and acknowledge its satisfaction of record, as well as report that the net proceeds have been distributed in accordance with this Judgment.

(6) The Court determines that there is no just reason for delay in entering this Judgment.

/s/ Lee E. Wells
Hon. Lee E. Wells,
Senior Judge

Dated: January 14, 2004

A copy of the foregoing was faxed this 14th day of January 2004 to the following:

Daniel E. Hamann, Esq. (816/421-7880) and mailed
Fritz Riesmeyer, Esq. (816/502-7898) and mailed
Bill Skepnek, Esq. (785/331-0303) and mailed
Steven M. Smoot, Esq. (713/781-4448)
David R. Buchanan, Esq. (816/421-1183) and mailed
Grant L. Davis, Esq. (816/472-5972)
Michael S. Ketchmark, Esq. (816/842-4129)
Derek Jokelson, Esq. (215/985-0476)

Carol S. Buchanan, Senior/Visiting Judges Law Clerk

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
AT KANSAS CITY

JEROME S. TILZER, individually and as the Plaintiff Ad Litem for RITA TILZER,	)	
Plaintiff,	)	Master No. 01-CV-21887-01
v.	)	Docket: RCP
COURTNEY PHARMACY, INC., et al.,	)	Case No. 01-CV-224509
Defendants.	)	

ORDER GRANTING MOTION FOR ATTORNEYS' LIEN

On January 2, 2004, the Law Offices of Davis, Bethune & Jones, L.L.C. and Davis, Ketchmark, Eischens & McCreight's Motion to Enforce Attorneys' Lien Pursuant to Mo. Rev. Stat. Section 484.130 came on for hearing. Movant Davis, Bethune & Jones (DB&J) appeared by and through its representative Grant L. Davis and its attorneys Spencer J. Brown and Daniel E. Hamann. Movant Davis, Ketchmark, Eischens & McCreight (DKEM) appeared pro se by and through Michael S. Ketchmark. Plaintiffs Jerome S. Tilzer, Todd Tilzer and Jill Jokelson appeared by and through their attorneys Frederick H. Riesmeyer II, William J. Skepnek and Steven Smoot. Also present were Mr. Jerome S. Tilzer and Derek Jokelson, who was admitted counsel *pro hac vice* for

plaintiffs until he was granted leave to withdraw in November of 2003.

Prior to the January 2, 2004 hearing plaintiff Jerome Tilzer submitted his "Response of Jerome S. Tilzer to Motion to Enforce Settlement Agreement of Eli Lilly and Company As Joined In By Bristol-Myers Squibb Company" which alleged misconduct of DB&J and DKEM. At a hearing which took place on December 22, 2003, which was attended by plaintiff Jerome Tilzer, the Court was informed by plaintiffs' counsel that plaintiffs' response to the attorneys' lien motion was as set forth in plaintiffs' aforementioned "Response". At the December 22 hearing plaintiffs' counsel stated that the "Terms of Settlement Agreement In re Courtney Litigation", on its face, was violative of Rule 4-1.8 of the Rules of Professional Conduct. The Court rejected that contention. Also at that hearing, upon inquiry by plaintiffs' counsel on the record, movants' counsel stated that DB&J's lien was thirty (30) percent of plaintiffs' recovery. The parties agreed upon January 2, 2004 as the date for hearing evidence on the facts and issues pertaining to the motion for enforcement of attorneys' lien.

On or about December 30, 2003 plaintiffs filed, in this matter, "Plaintiffs Jerome S. Tilzer, Todd A. Tilzer and Jill T. Jokelson's Counterclaim Against Defendant Law Firms Davis, Bethune & Jones, LLC and Davis, Ketchmark, Eischens, McCreight, P.C." In that document plaintiffs alleged that DB&J and DKEM committed a variety of wrongs constituting breach of fiduciary duty, professional negligence and

breach of contract. Among other relief, plaintiffs sought disgorgement of attorneys fees in every count of the "Counterclaim".

On January 2, 2004 the Court convened an evidentiary hearing. Plaintiffs, by and through their attorneys, moved for a continuance of the hearing. The Court denied plaintiffs' motion.

Before this Court, plaintiffs asserted that DB&J and DKEM were not entitled to collect their contracted fee, on the basis of their supposed misconduct. An attorney's malpractice or breach of fiduciary duty may preclude his recovery of his fee. *In re Thomasson's Estate,* 148 S.W.2d 757, 762 (Mo. 1941). At the January 2, 2004 hearing plaintiffs did not recant their claims of DB&J's and DKEM's supposed malpractice and breach of fiduciary duty. This Court thus proceeded to hear evidence to determine whether DB&J's and DKEM's motion was appropriate under all the facts and circumstances. *Satterfield* v. *Southern Railway Co.,* 287 S.W.2d 395, 397 (Mo. App. 1956).

As movants' first witness, Grant Davis, took the witness stand, plaintiff Jerome Tilzer, his attorneys and Mr. Jokelson elected to leave the courtroom, although plaintiff Jerome Tilzer, accompanied by his attorney William J. Skepnek, later testified upon examination by movants.

After conducting an evidentiary hearing in which Grant Davis, Esq. and plaintiff Jerome S. Tilzer testified, the Court finds as follows:

1. This case is one of more than 300 cases filed against defendants Eli Lilly and BMS in this Court arising out of the dilution of chemotherapy drugs by Robert Courtney.

2. In September of 2001, Jerome S. Tilzer, plaintiff herein, on behalf of his wife Rita Tilzer and himself, entered into a written contract with DB&J for legal services in respect of any claims arising out of the dilution of Rita Tilzer's chemotherapy drugs by Robert Courtney.

3. Under the terms of that written agreement the Tilzers agreed to a contingent fee of forty percent (40%) to DB&J, as more fully set forth in the agreement, a copy of which was received in evidence. DB&J subsequently agreed that attorney Derek Jokelson, plaintiff Jill Jokelson's husband, would receive one-fourth of their fee, reducing DB&J's contingent fee to thirty percent (30%).

4. DB&J associated DKEM as additional counsel for the Tilzers. This action was permitted by the contract. DKEM was to participate in DB&J's share of any proceeds.

5. Prior to entering into the contract with the Tilzers, DB&J did not make any false representations to induce the Tilzers' agreement. The Court finds the credible evidence to be that DB&J did not promise any outcome of the potential claims. DB&J made Mr. Tilzer aware that DB&J already represented other clients making claims in the Courtney controversy. With that knowledge, the Tilzers engaged DB&J.

There was no evidence that the Tilzer family demanded that DB&J discontinue their representation of other claimants at any time before or after they engaged DB&J.

6. This Court had admitted Derek Jokelson *pro hac vice* in the Tilzers' lawsuit. There is no evidence that Mr. Jokelson represented any Courtney litigation claimants other than the Tilzer family. Derek Jokelson was an attorney of record for the Tilzer family throughout the time of the alleged events described in the "Counterclaim". Derek Jokelson's father, Neil Jokelson, was and is an attorney, although not admitted in this case. The credible evidence is that the Tilzer family at various times consulted Derek Jokelson and/or Neil Jokelson. Derek Jokelson was involved in discovery and other pretrial activities.

7. DB&J and DKEM consulted with medical experts to develop competent and credible medical opinion evidence that would establish the requisite causal connection between Rita Tilzer's ingestion of diluted chemotherapy drugs and her further illness and death. None of the medical experts they contacted could supply opinion testimony satisfying the element of causation, however.

8. In October of 2002 Eli Lilly and Bristol Myers Squibb advanced a settlement proposal to plaintiffs and the other Courtney claimants.

9. Under the terms of this proposal, Eli Lilly and BMS would make substantial payments into a

settlement fund. Each person with a case on file against Eli Lilly or BMS could elect whether to participate in the settlement and receive proceeds from the settlement fund, or to continue litigating his/her individual case against Eli Lilly and/or BMS. Eli Lilly and BMS had the right to cancel the proposed settlement agreement if they felt that too many claimants elected to continue litigating their individual cases, but they had no obligation to do so. The exact size of the settlement fund was undetermined but would be established in an arbitration at a later date. The Tilzer family's recovery from the fund – should the Tilzers elect to participate – was to be decided by a special master at a later date. These aspects of the settlement proposal were disclosed to plaintiffs by DB&J in October of 2002. DB&J also advised plaintiffs that this was not an accomplished settlement but rather a proposal, and that unless they decided to participate in the proposed settlement their lawsuit would go forward.

10. Between October 2002 and December 26, 2002, Mr. Tilzer and his family members had numerous conversations with their lawyers concerning whether the Tilzers should participate in the proposed settlement. During this time period the Tilzers were also represented by, and received advice from, Derek Jokelson. Neil Jokelson further advised the Tilzers regarding whether they should participate in the settlement.

11. December 26, 2002 was the day when plaintiffs communicated to Grant Davis their decision

to participate in the proposed settlement. By that time plaintiffs had been informed that, of the more than 300 separate lawsuits on file against BMS and/or Eli Lilly, nearly all of the claimants except the Tilzers had decided to participate in the proposed settlement. It was no secret that these claims shared the basic theory that BMS and/or Eli Lilly should have done more to investigate, discover and disclose Courtney's wrongful conduct. Since the individual awards by the special master were not disclosed by the special master until April of 2003, clearly it would have been impossible for DB&J and DKEM to identify individual awards before plaintiffs joined in the settlement on December 26, 2002.

12. On December 26, 2002, Mr. Tilzer decided that he wished his case to be included in the proposed settlement with Eli Lilly and BMS. He signed a release of the defendants. He also signed a disclosure form indicating that the settlement proceeds would be allocated by Special Masters appointed by this Court. The disclosure also clearly advised Mr. Tilzer of his right to reject the settlement and continue litigating his own case in this Court, and specifically released his lawyers from any claimed conflict of interest as a result of the joint settlement approach.

13. The Court heard no credible evidence that plaintiffs' decision to participate in the proposed settlement was the product of any misrepresentations by DB&J or DKEM. There is no credible evidence of any misrepresentation, fraudulent or otherwise, by DB&J or DKEM. The Court heard no credible

evidence of any action or omission by DB&J or DKEM that fell below the standard of care required of lawyers under the circumstances. Moreover, there was no credible evidence that plaintiffs' decision was in fact induced by any such supposed conduct.

14. The Court heard no credible evidence that plaintiffs' decision to participate in the proposed settlement was due to coercion or duress exerted by DB&J or DKEM. The Court finds credible the testimony of Grant Davis that the law firms did not threaten to withdraw from their representation of plaintiffs if plaintiffs did not agree to join in the settlement, but rather advised Mr. Tilzer that if Mr. Tilzer intended to violate certain orders of this Court, such conduct could compel counsels' withdrawal. Moreover, the law firms did not act improperly in disclosing to plaintiffs the possibility that the settlement could proceed without them if they did not timely elect to participate. The law firms' appraisal of the prospects of plaintiffs' lawsuit reflect their professional judgment made in good faith, and it was not improper for them to candidly share their professional opinions with plaintiffs in order for them to make the best decision. While the Court is prepared to believe that Mr. Tilzer appreciated, and indeed felt, the weight of the decision whether or not to participate, the anxiety related to making an irrevocable decision does not translate to coercion or duress by the lawyers.

15. Pursuant to the settlement agreement, this Court appointed two Special Masters to make

proposed allocations of the settlement proceeds. Mr. Tilzer submitted a claim form that was evaluated by the Special Masters. Based on the information submitted, Mr. Tilzer's case was allocated an award of $308,633.50, which was one of the highest awards and was a fair and reasonable amount for the case. Plaintiffs were dissatisfied with this award and the Law Firms on plaintiffs' behalf filed an objection to it, which objection was fully considered and overruled by this Court.

16. Plaintiffs have alleged that DB&J and DKEM engaged in a variety of misconduct in the handling of their case. Plaintiffs allege that the law firms violated Supreme Court Rule 4-1.8(g). The Court disagrees. The law firms did not settle the plaintiffs' claims on an aggregate basis or otherwise. Rather, the law firms negotiated a proposed settlement in which plaintiffs could either elect to participate or else continue to pursue their own lawsuit. Plaintiffs were under no obligation to choose this settlement method to resolve their case. They could have continued litigating their case and proceeded to trial, but they elected not to do so. If plaintiffs had elected to continue litigating their case, that decision would not have affected the other parties to the settlement. Rule 4-1.8(g) therefore does not apply.

17. Plaintiffs further allege that the law firms failed to give them sufficient information to allow an informed decision regarding whether or not to participate in the proposed settlement. The Court disagrees. Mr. Tilzer was informed of the number of

potential claimants and the manner in which the Special Masters would make proposed allocations of the Settlement Fund amongst the competing claimants. Mr. Tilzer further received independent legal advice from Derek Jokelson and Neil Jokelson. The Court finds that Mr. Tilzer was provided with all relevant information that was available, which included all information he needed to make a knowing and intelligent decision regarding the proposed settlement.

18. Plaintiffs argue that the law firms had a conflict of interest representing both them and the firms' other clients before the Special Masters. There was no such conflict of interest. The Special Masters, under the direction of this Court, prepared the criteria that were used to allocate the settlement among the various claimants. Mr. Tilzer's lawyers simply aided their clients in submitting the information requested by the Special Masters. Moreover, the written disclosure provided to Mr. Tilzer and signed by Mr. Tilzer specifically informed him of his right to reject the settlement and continue litigating his own case, and Mr. Tilzer explicitly waived any possible conflict of interest arising from his attorneys aiding him in connection with the settlement. The Court finds that waiver to be knowing, intelligent and valid under the applicable ethical rules.

19. The Court heard no credible evidence of any negligent or intentional misconduct regarding the Claim Form submitted by plaintiffs. Mr. Tilzer participated substantially in the completion of that

form and signed it in its completed form. The form expressly permitted plaintiffs an opportunity to disclose any additional information which they thought was important to the determination of their award. There was no credible evidence that plaintiffs were somehow misled as to the form's meaning or significance. There was no credible evidence that any information likely to increase plaintiffs' award was withheld from the form by DB&J or DKEM.

20. Subsequent to the award plaintiffs directed movants to file an objection to the award. The credible evidence is that movants did so and included every ground plaintiffs instructed them to assert. There was no credible evidence that Grant Davis or Michael Ketchmark participated in, or even encouraged, the response to the objection that was signed by John Parisi for the Steering Committee. The pleading filed by Mr. Parisi was of little consequence and this Court would have overruled plaintiff Tilzer's objection without any reference to Mr. Parisi's pleading.

21. There was no credible evidence of any misconduct, intentional or otherwise, in DB&J's transmission of the "Release of Courtney Qualified Settlement Fund" in June of 2003. Mr. Davis' testimony makes clear that the "Release" was not a proposed release of DB&J and DKEM as counsel for plaintiffs.

Accordingly the Court finds that there was no credible evidence of any misconduct of DB&J and

DKEM, whether in the nature of breach of fiduciary duty, fraud, negligence or breach of contract. The credible evidence supports the existence of the contract and movants' performance under the contract resulting in a recovery to plaintiffs that is subject to the contract's promise to pay attorney's fees. The unsupported claims of misconduct provide no basis for the Court to disallow payment of the contracted fees in the amount of $92,590.05. The motion for enforcement of attorneys' lien is hereby GRANTED. It is hereby ORDERED that plaintiffs forthwith pay, or authorize the payment by third parties to, DB&J and DKEM jointly the sum of $92,590.05.

/s/ Lee E. Wells
Honorable Lee E. Wells,
Senior Judge

Dated: January 14, 2004

A copy of the foregoing was faxed this 14th day of January 2004 to the following:

Daniel E. Hamann, Esq. (816/421-7880) and mailed
Fritz Riesmeyer, Esq. (816/502-7898) and mailed
Bill Skepnek, Esq. (785/331-0303) and mailed
Steven M. Smoot, Esq. (713/781-4448) (713/266-8243)
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IN THE SUPREME COURT
OF THE STATE OF KANSAS

DALE L BECKERMAN
DEACY & DEACY
920 MAIN STE 1900
KANSAS CITY MO 64105-2010

CASE NO. 07-99678-AS

JEROME S. TILZER, ET AL., APPELLANTS,

V.

DAVIS, BETHUNE &
JONES, LLC., ET AL., APPELLEES.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

MOTION FOR REHEARING OR MODIFICATION BY DAVIS BETHUNE, ET AL.

CONSIDERED BY THE COURT AND DENIED. REPLY NOTED.

DATE: 06/04/2009.

CAROL G. GREEN
CLERK